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Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

PAUL JUNIOR FAIR and TAMMY FAIR,

Petitioners,

V.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

EDWARD D. TOLLEY
Counsel of Record
RONALD E. HOUSER
Cook, Noell, Tolley, Bates
& Michael, LLP
304 East Washington Street
Post Office Box 1927
Athens, Georgia 30603
(706) 549-6111

Balmar Legal Publishing Services, Washington, DC (202) 682-9829

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QUESTION PRESENTED FOR REVIEW

Does a trial court have a duty to ensure that defense attorneys do not unilaterally deprive criminal defendants of their fundamental federal constitutional right to testify by obtaining an on the record waiver showing that defendants who do not testify at the trial of their case knowingly and intelligently waived their federal right to testify?

LIST OF PARTIES

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit are:

Plaintiff-Appellee:	United States of America
Defendants-Appellants:	Paul Junior Fair Tammy Fair

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PAUL JUNIOR FAIR and TAMMY FAIR,
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V.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Paul Junior Fair and Tammy Fair, request that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action (11th Circuit Appeal No. 00-12788-F) on February 25, 2001, which affirmed the judgment of conviction and sentence imposed by the United States District Court for the Northern District of Georgia (District Court No. 2:99-CR-33).

OPINION BELOW

The district court did not render any written or oral opinion relevant to the questions presented for review. The opinion of the Court of Appeals is not reported, but is reproduced in the Appendix attached to this petition.

JURISDICTIONAL STATEMENT

The Eleventh Circuit Court of Appeals entered its judgment and opinion in this case on February 26, 2001, and denied a petition for rehearing on April 25, 2001. Petitioners timely file this petition pursuant to this Court's Rules 13.1 and 13.3.

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1). The notifications required by this Court's Rule 29.4(b) and (c) are not applicable in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

"[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). This right to testify is found in several provisions of the Constitution: the due process clause, the compulsory process clause, the Sixth Amendment's right of self-representation, and the necessary corollary of the guarantee against compelled testimony. *Rock*, 483 U.S. at 51-53.

STATEMENT OF THE CASE

A grand jury in the Northern District of Georgia, Gainesville Division, returned Criminal Indictment No. 2:99-CR-33 on June 16, 1999, charging Paul Junior Fair with various drug and firearms offenses. Petitioner Tammy Fair was not charged or named in this original indictment.

Four months later, on October 20, 1999, the grand jury returned Criminal Indictment No. 2:99-CR-33 (Superseding), which dropped the firearms offenses against Mr. Fair and charged Mrs. Fair as a co-defendant with Mr. Fair in two of the nine drug counts. The grand jury, in a second superseding indictment on November 16, 1999, changed the maintenance of a place for the purpose of distributing methamphetamine

count to a violation of 21 U.S.C. § 856(a)(1) instead of 21 U.S.C. § 856(a)(2).

Paul and Tammy Fair were jointly tried before a jury from February 23, 2000 - March 6, 2000, in the United States District Court for the Northern District of Georgia, Gainesville Division, the Hon. William C. O'Kelley, United States Senior District Judge, presiding.

Neither Mr. Fair nor Mrs. Fair testified during the trial, and the record contains no evidence that either of them knew of their right to testify. The jury found them both guilty as charged.

Each filed a timely motion for new trial which the district court denied on May 19, 2000. At the hearing on the motion, neither trial counsel nor the district court addressed the issue of a defendant's right to testify. The district court adjudged each of the Fairs guilty in judgments filed May 24, 2000, and imposed sentences thereon.

Thereafter, Mr. and Mrs. Fair retained new counsel for their appeal and filed their timely notice of appeal on May 25, 2000. The United States Court of Appeals for the Eleventh Circuit affirmed their convictions in an unpublished opinion filed on February 26, 2001, and denied their petition for rehearing on April 25, 2001. App. 1a-12a.

REASONS FOR ALLOWANCE OF THE WRIT

I. THIS PETITION FOR A *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; HAS DECIDED THAT IMPORTANT FEDERAL QUESTION IN A MANNER INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT; AND HAS DECIDED THAT IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF SEVERAL STATE COURTS OF LAST RESORT.

This Court has recognized the federal constitutional right of a criminal defendant to testify in his or her own trial, and has declared this right to be more fundamental than a criminal defendant's right to serve as one's own defense counsel. This Court has also established principles for protecting fundamental federal constitutional rights, *e.g.*, the exercise of fundamental federal constitutional rights does not depend upon a request from the defendant and waivers of fundamental constitutional rights are not presumed.

Federal and state courts differ in the assiduousness with which they apply these principles to a criminal defendant's federal constitutional right to testify. Thus, the Eleventh Circuit Court of Appeals presumed from a silent record that the Fairs knowingly and voluntarily waived their right to testify. However, if the Fairs had been tried a few miles away in a Tennessee state court, the trial court would have required a hearing on the record to ensure that the Fairs knew of their federal constitutional right to testify, and that defense counsel could not unilaterally deprive them of that right. Rather than presume a waiver from a silent record, the Tennessee state court would require the record to clearly show that any waiver of the right to testify was knowing and voluntary.

This Court must intervene to establish uniform procedural safeguards that eliminate this arbitrary discrepancy found across this nation in trial court protection of a criminal defendant's federal constitutional right to testify.

A. Federal Constitutional Right to Testify

"[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. at 49. "Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right." *Brooks v. Tennessee*, 406 U.S. at 612. This right to testify is found in several provisions of the Constitution: the due process clause, the compulsory process clause, the Sixth Amendment's right of self-representation, and the necessary corollary of the guarantee against compelled testimony. *Rock*, 483 U.S. at 51-53. "Even more fundamental to a personal defense than the right of self-representation. . .is an accused's right to present his own version of events in his own words." *Id.* at 52.

Federal and state courts uniformly hold that this federal constitutional right of criminal defendants to testify is fundamental and personal to the defendant, and cannot be waived by defense counsel, even though this Court has yet to explicitly so hold. *E.g.*, *United States v. Ortiz*, 82 F.3d 1066, 1070 (D.C. Cir. 1996); *Brown v. Artuz*, 124 F.3d 73, 77-78 (2nd Cir. 1997), *cert. denied*, 522 U.S. 1128 (1998); *United States v. Pennycooke*, 65 F.3d 9, 10 (3rd Cir. 1995); *United States v. McMeans*, 927 F.2d 162, 163 (4th Cir. 1991); *Jordan v. Hargett*, 34 F.3d 310, 312 (5th Cir. 1994), *vacated without consideration of this point*, 53 F.3d 94 (5th Cir. 1995)(*en banc*); *Rogers-Bey v. Lane*, 896 F.2d 279, 283 (7th Cir. 1990), *cert. denied*, *Rogers-Bey v. McGinnis*, 498 U.S. 831 (1990); *United States v. Bernloehr*, 833 F.2d 749, 751 (8th Cir. 1987); *United States v. Edwards*, 897 F.2d 445, 446-447 (9th Cir.), *cert. denied*, 498 U.S. 1000 (1990); *United States v. Teague*, 953 F.2d 1525, 1532 (11th Cir.)(*en banc*), *cert. denied*, 506 U.S. 842 (1992); *Momon v. State*, 18 S.W.3d 152, 161 (Tenn. 2000); *State v. Antoine*, 564 N.W.2d 637, 639 (N.D. 1997);

LaVigne v. State, 812 P.2d 217, 222 (Alaska 1991); *People v. Curtis*, 681 P.2d 504, 512 (Colo. 1984); *State v. Neuman*, 371 S.E.2d 77 (W.Va. 1988); *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979); *see also*, *Lema v. United States*, 987 F.2d 48, 52 (1st Cir. 1993)(assuming without deciding that the right to testify may not be waived by counsel).

B. Waivers of Constitutional Rights

This Court has asserted several principles to be used in assessing waivers of federal constitutional rights. One, a valid waiver requires "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464, (1938); *see also*, *Brookhart v. Janis*, 384 U.S. 1, 4 (1966); *Brewer v. Williams*, 430 U.S. 387, 404 (1977). Second, the exercise of federal constitutional rights does not depend upon a request from the defendant. *Carnley v. Cochran*, 369 U.S. 506, 513 (1962); *Williams*, 430 U.S. at 404. Third, courts should "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Johnson*, 304 U.S. at 464; *Boykin v. Alabama*, 395 U.S. 238, 242-243 (1969). Fourth, where the issue arises the government has the burden of establishing a valid waiver. *Williams*, 430 U.S. at 404. Fifth, "[d]oubts must be resolved in favor of protecting the constitutional claim." *Michigan v. Jackson*, 475 U.S. 625, 633 (1986).

C. Disparities in Protecting the Right to Testify

This case is representative of the disparities existing among courts across this land in the procedural protections used to ensure the federal constitutional right of criminal defendants to testify, despite this Court's well established principles for protecting fundamental federal constitutional rights. The circuit court in this case placed a burden upon the Fairs to make known to the district court their desire to testify, in effect, presuming a valid waiver from a silent record: "The record does not indicate, however, that Appellants alleged any exceptional circumstances before the trial court regarding this issue [i.e., their desire to testify]." App. 8a. The circuit

court's requirement that the Fairs make the district court aware of their desire to testify (even though the record does not indicate they even knew of their right to testify) conflicts with this Court's opinions in *Carnley v. Cochran*, *supra*, and *Brewer v. Williams*, *supra*, which make clear that the exercise of fundamental federal constitutional rights does not depend upon a request from the defendant. The circuit court's presumption of a waiver contradicts the presumption against waiver principle articulated by this Court in *Johnson v. Zerbst*, *supra*, and does not logically follow from the principle that doubts be resolved in favor of protecting the constitutional right, articulated by this Court in *Michigan v. Jackson*, *supra*.

However, if the Fairs had been arrested a few miles away across Georgia's boundary with Tennessee, and been tried in a Tennessee state court, the trial court would have protected their federal constitutional right to testify in a manner consistent with this Court's principles for assessing waivers of fundamental constitutional rights. *Momon v. State*, 18 S.W.3d 152 (Tenn. 2000). Defense counsel would have been required to *voir dire* them on the record concerning a waiver of the right to testify, thereby preventing defense counsel from unilaterally depriving them of their federal constitutional right to testify. *Id.* at 162.

Similar disparities in the protection of the federal right to testify occur in trial courts throughout this country. Courts fall into two principal camps--those that presume a valid waiver from a silent record, relying upon a posttrial ineffective assistance of counsel claim or habeas action to redress any violation of the right, *e.g.*, *Brown v. Artuz*, 124 F.3d at 78-79; *United States v. Pennycooke*, 65 F.3d at 12 ("court is entitled to--indeed should--presume that the attorney and the client have discussed that right"); *United States v. Webber*, 208 F.3d 545, 551 (6th Cir.), *cert. denied*, __ U.S. __, 121 S.Ct. 197 (2000); *United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993) (waiver of right to testify "presumed from defendant's failure to testify or notify the

court of his desire to do so"); *United States v. Teague*, 953 F.2d at 1532; *State v. Green*, 738 N.E.2d 1208, 1233 (Ohio 2000)(trial court not required to conduct an inquiry with the defendant concerning the decision whether to testify, and nothing in record suggested defendant wanted to testify or was denied the opportunity to do so); *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997)("When the trial court record is silent as to waiver, this court must presume that the decision not to testify was made by defendant voluntarily and intelligently"); *Phillips v. State*, 673 N.E.2d 1200, 1202 (Ind. 1996)(a trial court is entitled to presume that a lawyer and his client have discussed the possibility of testifying); *People v. Fratta*, 632 N.E.2d 1270, 1271 (N.Y. 1994) (defendant not deprived of his constitutional right to testify because he personally did not waive that right on the record); *Taylor v. State*, 843 P.2d 682, 688 (Kan. 1992)(court inquiry on the record regarding defendant's right to testify not necessary or appropriate); *State v. Hamm*, 818 P.2d 830, 833 (Mont. 1991)(court has no duty to inform the defendant of his right to testify or receive an on-the-record waiver); *Gilliam v. State*, 579 A.2d 744, 751 (Md. 1990), *cert. denied*, 498 U.S. 1110 (1991)(criminal defendants represented by counsel are presumed to have been informed of their right to testify); *State v. El-Tabech*, 453 N.W.2d 91, 95 (Neb. 1990); *State v. Mumley*, 571 A.2d 44, 45 (Vt. 1989), *cert. denied*, 496 U.S. 939 (1990); *Aragon v. State*, 760 P.2d 1174, 1179 (Idaho 1988), and those that protect the right at trial by requiring the trial court to ensure that a knowing and voluntary waiver appears on the record, *e.g.*, *Momon*, *supra* (Tenn. 2000), *LaVigne*, *supra* (Alaska 1991); *Neuman*, *supra* (W.Va. 1988); *Curtis*, *supra* (Colo. 1984); *Tachibana v. State*, 900 P.2d 1293, 1300 (Hawaii 1995) (decided under a state constitutional provision); *Culberson v. State*, 412 So.2d 1184, 1186-1187 (Miss. 1982)(decided under a state constitutional provision). Numerous trial courts, even though not required to conduct an on the record colloquy to ensure a valid waiver of the federal right to testify, nevertheless, do conduct such a colloquy. *See*, "Colloquy Approach," *infra*, pages 9-11.

D. Presumption of Waiver Approach

As shown above, at pages 5-6, all courts agree that the federal constitutional right of criminal defendants to testify is fundamental and personal to the defendant, and cannot be waived by defense counsel. However, due to concerns that a court might intrude into the attorney-client relationship or influence the defendant in the making of his or her choice, some courts presume a waiver of the right and do not require the trial judge to ensure that a valid waiver of the federal right to testify appears on the record. In the words of the court below, it "would be inappropriate to require the trial court to discuss this choice with the defendant [because s]uch a requirement would unnecessarily intrude into the attorney-client relationship and could unintentionally influence the defendant in his or her choice." App. 8a.

These same concerns have caused other courts to not require trial courts to investigate the validity of a waiver of the right to testify, *Teague*, *supra*, 953 F.2d at 1533 n. 8; *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991); *United States v. Martinez*, 883 F.2d 750, 760 (9th Cir. 1989), *vacated on other grounds*, 928 F.2d 1470, *cert. denied*, 501 U.S. 1249 (1991); *Siciliano v. Vose*, 834 F.2d 29, 30 (1st Cir. 1987), but at least one federal circuit court displayed uneasiness with this position: "courts, including this one, **perhaps unwisely**, have concluded that the district court does not have a *sua sponte* duty to conduct a colloquy with the defendant at trial to determine whether the defendant has knowingly and intelligently waived the right to testify." *Sexton v. French*, 163 F.3d 874, 881 (4th Cir. 1998), *cert. denied*, 520 U.S. 855 (1999)(emphasis added). Despite these concerns, many trial courts do engage in either a mandated or discretionary colloquy.

E. Colloquy Approach

At least four state courts of last resort require the trial court to ascertain on the record that a nontestifying defendant made an intelligent and voluntary personal decision to waive

the federally guaranteed right to testify. *Momon, supra*, 18 S.W.3d at 162 (Tenn. 2000); *LaVigne, supra*, 812 P.2d at 222 (Alaska 1991); *Neuman, supra*, 371 S.E.2d at 81 (W.Va. 1988); *Curtis, supra*, 681 P.2d at 512-515 (Colo. 1984). Two other state courts of last resort require a waiver on the record pursuant to a like provision in the state constitution. *Tachibana, supra*, 900 P.2d at 1300 (Hawaii 1995); *Culberson, supra*, 412 So.2d at 1186-1187 (Miss. 1982).

Furthermore, at least three more state courts of last resort, although not mandating an on the record waiver, clearly think that trial courts should make such a record. *Phillips v. State*, 782 P.2d 381, 382 (Nev. 1989)(every defendant should be advised on the record by the court of his right to testify); *Torres-Arboledo v. State*, 524 So.2d 403, 411 n. 2 (Fla.), *cert. denied*, 488 U.S. 901 (1988)(although trial court has no duty to make a record of waiver, it would be advisable for the trial court to make a record); *Commonwealth v. Waters*, 506 N.E.2d 859, 866 n. 3 (Mass. 1987)(may be better practice for a judge to inform a defendant before trial of the right to testify and the right not to testify; that the decision, although made in consultation with counsel, is ultimately the defendant's own; and that the court will protect the defendant's decision). One state intermediate appellate court characterized the issue of a defendant's decision whether to testify as an "explosive situation," and "urge[d] trial courts *in every criminal case* to take the few seconds needed, after the State has rested its case in chief and before the presentation of the defense case, to admonish the defendant personally that he alone possesses the right to choose whether to testify on his own behalf, and that he should make that decision after consulting with counsel." *People v. Frieberg*, 713 N.E.3d 210, 219 (Ill.App.Ct. 1999)(italics in original). Establishment on the record of any waiver of the right to testify prevents an involuntary waiver of the right and facilitates meaningful appellate review.

Finally, concerns with judicial intrusion into the attorney-client relationship or influence upon the defendant in

the making of his or her choice have not stopped numerous federal and state courts from engaging in a direct colloquy with criminal defendants regarding the right to testify, even though it is not mandated. *See*, *Byrd v. State*, __ S.E.2d __(Ga.No. S01A0064, 2001); *Commonwealth v. Degro*, 733 N.E.2d 1024, 1040 (Mass. 2000); *Vanzandt v. State*, 730 N.E.2d 721, 724 (Ind.Ct.App. 2000); *United States v. Richardson*, 195 F.3d 192, 197 (4th Cir. 1999) *cert. denied*, 528 U.S. 1096 (2000); *Gibby v. State*, 753 S.2d 1206 (Ala.Crim.App., 1999); *Burgos-Seberos v. State*, 969 P.2d 1131 (Wyo. 1998); *Alff v. State*, 970 S.W.2d 401 (Mo.Ct.App. 1998); *Commonwealth v. Hall*, 701 A.2d 190, 202 n. 13 (Pa. 1997), *cert. denied*, 523 U.S. 1082 (1998); *United States v. Taylor*, 128 F.3d 1105, 1107 (7th Cir. 1997); *United States v. Castillo*, 14 F.3d 802, 805 (2nd Cir.), *cert. denied*, 513 U.S. 829 (1994); *Bowman v. United States*, 652 A.2d 64, 74 (D.C. 1994); *State v. Joyner*, 625 A.2d 791, 807 n. 14 (Conn. 1993); *United States v. Barrows*, 996 F.2d 12, 14 (1st Cir.), *cert. denied*, 510 U.S. 958 (1993); *United States v. Joelson*, 7 F.3d 174, 176-177 (9th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *United States v. Gleason*, 980 F.2d 1183, 1185 (8th Cir. 1992); *Jackson v. United States*, 928 F.2d 245, 246-247 (8th Cir.), *cert. denied*, 502 U.S. 828 (1991).

In summary, an on the record colloquy establishing a knowing and intelligent waiver of the right to testify is required in six states and recommended in at least four other states. A number of trial courts in at least another eight states, six federal circuits and the District of Columbia do engage in a colloquy with criminal defendants informing them of their right to testify despite not being required or encouraged to do so. Thus, the federal constitutional right of criminal defendants to testify in their trial is protected by a significant number of trial courts, but not protected by numerous other trial courts, including the trial court in this case. This Court should intervene to establish a uniform procedure to eliminate this arbitrary and haphazard enforcement of the federal constitutional right of criminal defendants to testify.

F. Ineffective Assistance of Counsel Claim

The "colloquy approach" ensures at trial that any waiver of the right to testify is valid, precludes posttrial disputes between counsel and the defendant, and facilitates appellate review. However, courts relying upon the "presumption of waiver approach" depend upon defense counsel to advise criminal defendants of their federal constitutional right to testify. Since "it is primarily the responsibility of defense counsel to advise the defendant of his right to testify and thereby to ensure that the right is protected . . .the appropriate vehicle for claims that the defendant's right to testify was violated by defense counsel is a claim of ineffective assistance of counsel." *United States v. Teague, supra*, 953 F.2d at 1534; *also, Brown v. Artuz, supra*, 124 F.3d at 79-80; *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001).

Reliance upon an ineffective assistance of counsel claim as the vehicle to protect a criminal defendant's federal right to testify is problematic. First, it generally does nothing at trial to prevent a violation of an unknowing or timid defendant's right to testify, and generally precludes any relief on direct appeal since appellate courts generally "do not consider claims of ineffective assistance of counsel on direct appeal, because there usually has been insufficient opportunity to develop the record regarding the merits of these claims." *United States v. Camacho*, 40 F.3d 349, 355 (11th Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995).

Secondly, it presents the added problem of shifting the burden from the government to the defendant, contrary to prior decisions of this Court holding that the government generally has the burden to show an effective waiver of a fundamental right. *Barker v. Wingo*, 407 U.S. 514, 529 (1972); *Boykin v. Alabama, supra*, 395 U.S. at 242-243; *Carnley, supra*, 369 U.S. at 516. Seeking redress via an ineffective assistance of counsel claim places a burden upon the defendant to first prove that defense counsel unilaterally made the decision that the defendant not testify, and second that this deprivation of defendant's constitutional right to

testify prejudiced the defense. *See*, *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Teague, supra*, 953 F.2d at 1534; *Commonwealth v. Uderra*, 706 A.2d 334; 340 (Pa. 1998), *cert. denied*, 526 U.S. 1070 (1999).

Finally, defendants are totally dependant upon habeas counsel to raise the issue of a valid waiver, unless they themselves are aware they possess that right. If they did not know of the right at trial, it is unlikely they will know to have counsel raise it in a postconviction proceeding. The ineffective assistance of counsel approach to protect the federal right to testify may even result in an accused's failing to get a hearing of his claim. *United States v. Martinez*, 181 F.3d 627 (5th Cir. 1999).

Conclusion

How many criminal defendants are unilaterally deprived of their federally guaranteed right to testify by defense counsel, simply because the trial court does not inform them of this fundamental constitutional right? How many criminal defendants fail to gain redress for a violation at trial of this federally guaranteed right because either they or habeas counsel fail to raise an ineffective assistance of counsel claim based upon defense counsel's unilateral decision to not call the defendant as a witness at trial? The answer to each of these questions should be, but is not, none. This Court needs to establish procedural protections for use in all federal and state trial courts to eliminate the present arbitrary and haphazard enforcement of the federally guaranteed right of criminal defendants to testify in their own trial.

This Petition for a *Writ of Certiorari* should be granted so that this Court can decide an important question of federal law which has not been, but should be, settled by this Court, i.e., whether a trial court has a duty to ensure that defense attorneys do not unilaterally deprive criminal defendants of their federal constitutional right to testify by obtaining an on the record waiver showing that a defendant who does not testify at the trial of her or his case knowingly and

intelligently waived their federal right to testify. Resolution of this federal question is important because of the implications for the fair administration of criminal justice.

Respectfully submitted,

EDWARD D. TOLLEY
Counsel of Record
RONALD E. HOUSER
Cook, Noell, Tolley, Bates
& Michael, LLP
304 East Washington Street
Post Office Box 1927
Athens, Georgia 30603
(706) 549-6111

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-12788
Non-Argument Calendar

D.C. Docket No. 99-00033-CR-WCO-2-1

Filed February 26, 2001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PAUL JUNIOR FAIR, TAMMY FAIR,
a.k.a Tammy Juanita Henslee, a.k.a Juanita Lathan,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(February 26, 2001)

Before BIRCH, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

Paul Junior Fair appeals his convictions and 320-month sentence for conspiring to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 846, aiding and abetting in maintaining a place for distribution and use of methamphetamine, in violation of 21 U.S.C. § 856(a)(1), six counts of distributing methamphetamine, in violation of 841(a)(1), and possession of methamphetamine with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1). Tammy Fair appeals her convictions and 188-month sentence for aiding and abetting in maintaining a place for distribution and use of methamphetamine and possession of methamphetamine with the intent to distribute.

On appeal, the Fairs argue that (1) the district court erred by not granting Tammy Fair's motion for a judgment of acquittal at the close of the government's case because the evidence was insufficient to support her convictions; (2) the district court erred by failing to dismiss the indictment against them on the grounds that the government obtained their trial strategy and tactics in violation of their Sixth Amendment right to the assistance of counsel; (3) the district court erred when it did not ensure that Appellants' failure to take the stand was a knowing and intelligent waiver of their constitutional right to testify; and (4) the district court erred by adding a two-point upward adjustment for obstruction of justice to Paul Junior Fair's offense level in determining his sentence.

We review a challenge to the sufficiency of the evidence presented below de novo, but the district court's denial of a judgment of acquittal will be upheld if a reasonable fact finder could have found that the evidence established the defendant's guilt beyond a reasonable doubt. See United States v. Lyons, 53 F.3d 1198, 1199 (11th Cir.) cert. denied, 516 U.S. 537 (1995). We address the district court's decision not to dismiss Appellants' indictments as a mixed question of law and fact; we review the court's factual findings for clear

error and its legal conclusions de novo. See United States v. Smith, 231 F.3d 800, 806 (11th Cir. 2000). Whether the district court erred by not sua sponte ensuring that Paul and Tammy Fair knowingly and intelligently waived their right to testify is a question of law, which we also review de novo. See United States v. Van De Walker, 141 F.3d 1451, 1452 (11th Cir.) cert.denied, 525 U.S. 912, 119 S.Ct. 257, 142 L. Ed. 2d 211 (1998). Finally, we review the district court's factual findings of obstruction of justice for clear error and the guidelines application to those facts de novo. United States v. Garcia, 13 F.3d 1464, 1471 (11th Cir.), cert.denied sub.nom Chaves v. United States, 512 U.S. 1226, 114 S.Ct. 2723, 129 L.Ed. 2d 847 (1994).

Upon thorough review of the record, as well as careful consideration of the parties' briefs, we find no reversible error and affirm.

I.

Tammy Fair contends that the United States failed to prove beyond a reasonable doubt each element of the two offenses for which she was charged, and that the district court thus erred in denying her motion for a judgment of acquittal. Title 21, United States Code, Section 856(a)(1) prohibits "knowingly maintain[ing] or open[ing] any place for the purpose of manufacturing, distributing, or using any controlled substance." A conviction under Section 856(a)(1) required two mental elements, knowledge and purpose. See United States v. Clavis, 956 F.2d 1079, 1090 (11th Cir. 1992). Title 21, United States Code, Section 841(a)(1) prohibits "knowingly and intentionally possess[ing] with intent to distribute a controlled substance." To sustain a conviction under Section 841, the Government must show 1) knowledge, 2) possession, and 3) intent to distribute, all of which may be shown by direct or circumstantial evidence. See United States v. Poole, 878 F.2d 1389, 1391 (11th Cir. 1989).

As to Count Two--the knowing maintenance of a place for the purpose of using and distributing methamphetamine--

Fair argues that the government failed to present evidence that she engaged in any of the acts that we listed in Clavis as dispositive of the knowing maintenance of a place for the purpose of manufacturing, distributing, or using a controlled substance: "control, duration, acquisition of the site,...supervising, protecting, supplying food to those at the site, and continuity." Clavis, 956 F.2d at 1091. However, the foregoing list from Clavis simply provides some examples of acts "that might constitute knowingly maintaining"; the list is nonexhaustive and its individual factors nonessential to conviction. Id. (emphasis added). Rather, a defendant's guilt regarding the charge of maintaining a place for the purpose of distributing methamphetamine is determined by a "totality of the evidence." Id. at 1094.

Quite simply, a reasonable jury could properly infer Fair's guilt on Count Two from the totality of the evidence, which included: the seizure of drugs, drug paraphernalia, and cash from various parts of the house in which Tammy Fair resided; her retrieval, on more than one occasion, of purchase money upon Paul Fair's request; her retrieval, on more than one occasion, of methamphetamine from other parts of the house during David Dowdle's[1] transactions with Paul Fair; the seizure of a prescription pill bottle with Tammy Fair's name on it that contained a plastic bag with methamphetamine residue; and the testimony of other witnesses placing Tammy Fair, or a woman whom a jury could reasonably infer to be her, at the house during several drug transactions. The district court did not err by denying Tammy Fair's motion for judgment of acquittal as to Count Two.

We likewise find that the government presented sufficient evidence to support Tammy Fair's conviction under Count Nine, possession with intent to distribute, notwithstanding Fair's argument that she was not present at the time of the search and seizure by federal agents, and had

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[1] Dowdle was an unindicted co-conspirator who testified at trial.

not been present for some days prior to the search. A jury could reasonably conclude that Tammy Fair knew of, exercised possession of, and intended to distribute the methamphetamines seized from her home. Knowledge, constructive possession, and intent to distribute can be proven through circumstantial evidence. See Poole, 878 F.2d at 1391. Thus, on the facts discussed above, a jury could also reasonably draw inferences of Tammy Fair's guilt on Count Nine. Accordingly, the district court did not err on this basis.

II.

Appellants also contend that the district court erred in declining to dismiss the their indictments on the grounds that the government obtained their trial strategy and tactics in violation of their Sixth Amendment right to the assistance of counsel.

This claim arises from the Government's monitoring of conversations between Dowdle, an informant and later a witness for the Government, and Paul Fair after both defendants had been indicted. Dowdle had previously signed a plea agreement with the government and, in mid-January, 2000, agreed to wear a wire transmitter and meet with Paul Fair on February 2, 2000. The conversations contained information concerning the Fairs' cases, including information regarding the Fairs' counsel, their defense, and potential witnesses in the upcoming trial. The conversation was taped, and a copy of the recording was sent to the United States Attorney for the Northern District of Georgia. Appellants moved to dismiss their indictments, and the trial court conducted a pre-trial "taint hearing" on the issue.

At the hearing, the Assistant United States Attorney prosecuting the Fairs' case testified that upon learning of the tape's existence, he constructed a "firewall" or "Chinese wall" between himself and Dowdle. He also named a "taint attorney," Assistant United States Attorney Lisa Tarvin, to whom he forwarded the recording. Appellants assert that the prosecuting attorney "acknowledged that at least a portion of

the content of the tape recording of the conversations was relayed to him in generalities...and...did not specifically deny hearing specifics regarding the tape contents from the agent assisting him in developing the government's strategy for trial." The prosecuting attorney testified that he "did not recall [the agent] saying anything to me about the contents of the tape...because I told him repeatedly I couldn't hear what was on the tapes."

Several other witnesses also testified at the hearing. Dowdle stated that he had not advised the prosecuting attorney or the case agent that the conversation would take place and had not discussed the contents of the conversation with them. DEA Special Agent Timothy Charles Teal testified that he instructed Dowdle to meet with Paul Fair to "determine if [he] was still dealing methamphetamine" and that the prosecuting attorney and case agent did not know in advance about the meeting between Dowdle and Fair. Although Special Agent Teal listened to the tape and heard some discussion of Fair's defense strategy, attorneys, and witnesses, he did not discuss the contents of the tape with the prosecuting attorney or the "details" of the tape with the case agent. Another government agent who testified to having heard the tape stated that he did not discuss the contents of the conversation with the case agent or the prosecuting attorney.

At the end of the taint hearing, the district court expressed concern about the Government's "inexcusable" and "inappropriate conduct" but found that the prosecuting attorney had successfully "walled off" Dowdle and the information contained on the tape. The court denied Appellants' motion to dismiss the indictment but ordered that Dowdle not be permitted to testify at trial about the February 2, 2000, conversation with Paul Fair.

In this appeal, Appellants argue that "[n]o amount of wallbuilding can cure such a breech of the right to counsel." Appellants further assert that their Sixth Amendment right to counsel is violated when "the government obtains 'information concerning trial tactics' by knowingly

circumventing the accused's right to have counsel present in a confrontation between the accused and a government agent," and that, accordingly, this Court should vacate their convictions and sentences and remand the case to the district court with instructions to dismiss the indictments.

We have found, in some circumstances, that a government intrusion "upon the confidential relationship between a criminal defendant and his attorney, either through surreptitious electronic means or through an informant" is a violation of the Sixth Amendment right to counsel. U.S. v. Zarzour, 432 F.2d 1, 3 (5th Cir. 1970). It is unclear whether Dowdle's February 2, 2000, conversation with Fair can be characterized as an intrusion upon the confidential attorney-client relationship, since Dowdle did not overhear or intercept any communications between Fair and his attorney.

Yet we need not address this question, for we have held that even intrusions upon the attorney-client relationship do not necessarily "vitiate the conviction without a further showing that the government's evidence was 'tainted.'" Id. at 4. In this case, the district court determined at the pre-trial "taint hearing" that the prosecuting attorney had successfully walled off the tainted information, that Dowdle's conversation with Fair was justified as part of further investigation of suspected continuing criminal actions, and that the purpose of Dowdle's conversation with Fair was not to gain privileged information on his defense strategy or his relationship with his attorney. The district court also ordered that Dowdle not be permitted to testify about the February 2, 2000, conversation with Paul Fair. Because the district court applied the correct standard of law and, after conducting a taint hearing, made the factual determination that no improper taint had occurred, we hold that the district court did not reversibly err in denying Appellants' motion to dismiss the indictment.

III.

Appellants also argue that the district court erred by not sua sponte ensuring that they knowingly and intelligently

waived their constitutional right to testify. In Van De Walker, we considered whether a trial court has a sua sponte duty to explain to a criminal defendant that he has a right to testify or to conduct an on-the record inquiry into whether a defendant that is not testifying has waived the right knowingly, voluntarily, and intelligently. We answered that question in the negative. See 141 F.3d at 1452. "[I]t would be inappropriate to require the trial court to discuss this choice with the defendant. Such a requirement would unnecessarily intrude into the attorney-client relationship and could unintentionally influence the defendant in his or her choice." Id. (quoting United States v. Teague, 953 F.2d 1525, 1533 n.8 (11th Cir. 1992)); see also Brown v. Artuz, 124 F.3d 73, 77-79 (2nd Cir. 1997), cert. denied, 522 U.S. 1128, 118 S.Ct. 1077, 140 L.Ed.2d 135 (1998); United States v. Ortiz, 82 F.3d 1066, 1071-72 (D.C. Cir. 1996); United States v. Pennycooke, 65 F.3d 9, 11 (3rd Cir. 1995).

We recognized in Van De Walker that "'judicial interjection through a direct colloquy with the defendant may be required' in 'exceptional, narrowly defined circumstances,'" such as when the trial judge has reason to believe that defense counsel is frustrating the defendant's desire to testify, where the defendant has expressed his desire to testify to the court, or where there appears to be no rational explanation for the defendant's decision not to testify. See Van De Walker, 141 F.3d at 1452 n.2 (quoting Artuz, 124 F.3d at 79 n.2). The record does not indicate, however, that Appellants alleged any exceptional circumstances before the trial court regarding this issue. Rather, according to Appellants' own brief, Paul Fair "complained that his and his wife's lawyers failed to call any of some twenty-five available witnesses," which the district court duly noted. We cannot infer from Paul Fair's statement any "suggestion" that Fair alleged any exceptional circumstances in regard to his own right to testify. We accordingly hold that Van De Walker squarely applies in this case. Because the district court correctly applied the relevant law, we affirm.

IV

The final issue we address in this appeal is whether the district court erred by enhancing Paul Fair's sentence for obstruction of justice.[2]

Section 3C1.1 of the Sentencing Guidelines provides for a two-level enhancement if the defendant is found to have willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of an offense. U.S.S.G. § 3C1.1. Examples of such conduct include "threatening, intimidating, or otherwise unlawfully influencing a ...witness." Id. at comment (n.4(a)). The government has the burden of proving the applicability of a sentencing enhancement for obstruction of justice. See United States v. Cataldo, 171 F.3d 1316, 1321 (11th Cir.), cert. denied, 528 U.S. 879, 120 S.Ct. 189, 145 L.Ed. 2d 159 (1999).

Paul and Tammy Fair were found guilty of conspiracy to distribute methamphetamine from their home. At the sentencing hearing, the Government presented evidence that Paul and Tammy Fair both knew about an attempt to induce Bob Napier not to testify. Daniel Birchfield testified that the Fairs knew that he had spoken to Napier about the matter. Government's Exhibit 3, a letter to Napier, states that "Paul" said that Napier would receive money in exchange for not

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[2] The Government moves this Court to include an exhibit as part of the record on appeal. Federal Rule of Appellate Procedure 10(e)(2) permits the Court to correct the record when a material item was accidentally omitted from the record. In this case, the record reflects that the Government's Exhibit 3, a letter addressed to Bob Napier, was offered and admitted into evidence. That the document is not a part of the record now appears to be by error. Appellants object to the Government's motion only to the extent that they argue that "the district court erred if it relied upon Government Exhibit 3 to make its finding as to Paul Junior Fair"—an assertion based on the Appellants' factual claim, which we address infra, that Daniel Birchfield wrote the letter at Tammy Fair's request. Because the letter was mistakenly omitted from the record, we grant the Government's motion.

testifying against him. Given these facts, and the nature of the Fairs' relationship and their proven conspiracy, it was entirely reasonable for the sentencing judge to conclude that Paul Fair played a role in attempting to induce Napier not to testify against him. The district court did not err in finding that Fair attempted to obstruct justice.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 00-12788 FF

Filed April 25, 2001

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

PAUL JUNIOR FAIR, TAMMY FAIR,
a.k.a Tammy Juanita Henslee, a.k.a Juanita Lathan,
Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion_____, 11th Cir., 19__, _____F.2d____).

Before: BIRCH, BARKETT and MARCUS, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley Marcus
UNITED STATES CIRCUIT JUDGE